

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DUE PROCESS AND COMPLAINTS

HEARING OFFICER'S DECISION



School Division _____

Name of Parents _____

Division Superintendent _____

Name of Child _____

Counsel Representing LEA _____

Counsel Representing Parent/Child _____

Hearing Officer _____

Party Initiating Hearing _____

- I. BRIEF OVERVIEW - This case involves a severely autistic child who has been placed privately by the parents at the _____ which is affiliated with the _____. An IEP was developed by the _____ on _____. The parents rejected the proposed IEP, gave appropriate notice of their intent to place the child at the _____ for the _____ school year, and now seek reimbursement of educational expenses for that year.
- II. REVIEW OF DUE PROCESS PROCEDURE - On _____, the mother of _____ requested a due process hearing. On _____, the undersigned Hearing Officer was appointed. On _____, an initial hearing date was set by the Hearing Officer and all parties were notified. On _____, the Hearing Officer received formal confirmation of his appointment from the Virginia Department of Education. On _____, a pre-hearing conference was held with the parties and on _____, the Hearing Officer filed his Pre-Hearing Report. At the request of both parties the Hearing Officer personally visited the classroom for autistic children at _____ School and the _____. The _____ presented its evidence at the first day of the hearing on the _____. The parents presented evidence on the _____ and the _____ presented rebuttal evidence on the _____. and both parties made closing arguments. Each party was given an opportunity to submit "proposed" findings of fact and conclusions of law briefs which have been received. The deadline for this decision was initially set for _____ but revised to _____ to comply with the 45 day rule.

III. EVIDENCE BEFORE THE HEARING OFFICER - The following were received into evidence.

1. Information received from the Hearing Officer's personal visit to the classroom for autistic children at
2. Information received from the Hearing Officer's personal visit to the
3. At the request of the Hearing Officer the parties presented joint exhibits. There were 99 joint exhibits which were exchanged and agreed upon by the parties five days in advance of the initial hearing date. On the the parties by joint agreement presented into evidence exhibit 76-A which was an initial draft of an IEP generated from an IEP meeting held on . On the the parties by joint agreement presented into evidence exhibit 76-B which is a hand written version of the draft IEP meeting held on . By agreement the parties were allowed to present photos of the and the autism classroom at . They were received and placed into the second volume of the exhibit book as exhibits 100 and 101. All of the exhibits were received into evidence.
4. A verbatim transcript of the Hearing. The witnesses testifying were as follows:
 - A.
 - B.
 - C.
 - D. Ph.D.
 - E. Dr.
 - F.
 - G.
 - H.
5. The following items are received into the record of this case by the Hearing Officer
 - A. Letter dated and received on from confirming acceptance of appointment along with a copy of the letter of requesting due process.
 - B. Letter dated from Hearing Officer setting initial hearing date and time.
 - C. Letter to Hearing Officer dated which was received on from Virginia Department of

Education confirming appointment of Hearing Officer.

- D. Initial Pre-Hearing Report of Hearing Officer dated
- E. Pre-Hearing Memorandum submitted by
- F. Proposed Findings of Fact and Conclusions of Law submitted by parents' counsel.
- G. Proposed Findings of Fact and Conclusions of Law submitted by counsel for

IV. FINDINGS OF FACT - I find from my personal observation of each of the schools, the testimony of the witnesses, testimony of the parents and the exhibits the following facts, to-wit:

1. [redacted] was born on 1 [redacted] to [redacted] and [redacted] (Exb. 2)
2. [redacted] is a severely autistic child with a Childhood Autism Rating Scale (CARS) score of 46 (Exb. 45) which is severe. With intense intervention [redacted] has improved to a 41.5 score (Exb. 66; testimony T-449, 17).
3. When not attended to in a one on one situation [redacted] aggressively engages in an activity known as "self stimulation" and sometimes referred to as "stimming". (Exbs 30, 45, 47, 50 psychological report 51 3C, 56 last page & 65; [redacted] testimony T-176, 15-22; [redacted] testimony T-410, 8-11; T-418, 14).
4. When engaged in stimming [redacted] is so engaged in the activity that [redacted] ability to learn is precluded. (See Exb. 50, 65: [redacted] testimony T-348, 3-8; [redacted] testimony T-437, 17 through T438-7; testimony T-731, 17-25; [redacted] testimony T-527, 9; [redacted] testimony T-571, 17).
5. [redacted] has a significant deficit in communication skills (Exbs. 5, 17, 30, 32, 45, 45, 46, 47, 56, 64 & 67) and could speak no words at 24 months (Exb. 5, paragraph 2) nor could [redacted] follow verbal commands at 31 months of age. (Exb. 17, page 2 #2; [redacted] testimony T177, 12-16).
6. [redacted] / has a low frustration level which leads to significant behavioral problems including, biting, slapping, pinching, table sweeps, kicking, crying and engaging in a tantrum. (Exbs. 17 p2, 17 p3, 36, 44, 50 page 2, 56, 57, 59, 66 page 3, & 75; [redacted] testimony T-

732, 1-12).

7. has very little ability at staying on task. At 44 months of age could independently stay on task for up to 5 minutes (Exb. 64) and can wait unattended quietly for up to 30 seconds. (Exb. 77 page 2).
8. lacks joint attention skills. (testimony T-423, 18-24; testimony T-686, 20; T-701, 9; 728, 14; T-867, 7; testimony T-919, 19; T-919, 24)
9. While at the has made progress. (Exbs. 11, 27, 45, 46, 47, 50 page 2, 56, 59 & 64.)
10. Because the actions of children are unpredictable , is afraid to be around them. (testimony T-707, 17-24).
11. does not possess the ability to imitate. (Exbs. 3, 5, 11, 27, 29 p2, 30, 47, testimony T411, 17-25). At 46 months of age ability had reached that of an 18- 24 month old. (Exb. 67, testimony T-412, 11-24; T-426, 24)
12. will regress significantly without an extended school year. testimony T-276 5-7; testimony T-439, 16; T-438, 19 and T-436, 8; testimony T-814, 21 through T-815, 5; testimony gives specific samples of regression for even short periods of time T-539, 18; T-622, 14; T-646, 20)
13. educational experience is as follows:
 - A. At 12 months of age the parents knew had a problem and by 20 months had in an early intervention program. (Exb. 3)
 - B. At 26 months had first evaluation and was diagnosed as autistic (Exb. 3, page 2; see also Exb. 6)
 - C. At 26 months began to receive services through the program at the which is administered pursuant to Part C of Individuals with Disabilities Education Act (IDEA) and is now referred to as the (Exb. 5, page 15)
 - D. At 29 months of age was referred by and an initial plan was developed on ,

8 & 9)

- E. At 30 months of age () had not made progress and was significantly developmentally delayed in all areas tested by (Exb. 11, page 2 summary.)
- F. The parents were under the impression that services would not be available to until reached the age of three. (note: under Federal Regulations services under Part C continue until a child reaches the age of 3 after which the child transitions into the public schools under Part B. However, under Virginia regulations parents can actually transition from Part C to Part B if the child reaches the age of 2 prior to September 30. Since was born on could have transitioned in September of)
- G. When was 32 months old the parents who had previously been referred to enrolled there (Exb. 14) and discontinued the Eligibility assessment with (Exb. 13).
- H. When was 34 months old was referred by the () for speech and OT services. (Exb. 23).
- I. At 37 months () had made some progress in some areas (Compare Exb. 11 summary to Exb. 29 summary) but still more than 25% developmentally delayed and self stimulated (Exb. 30, page 2)
- J. was diagnosed by as Developmentally Delayed. (Exb. 33).
- K. Between 37 months and 46 months made some additional progress while at the Compare Exb. 29 summary with Exb. 67 summary, see also Exbs. 11, 27, 45, 46, 47, 50 page 2, 56, 59 & 64.)
- L. offered , a Service Plan for the entire year () consisting of 21 half hour sessions of OT related services and 7 half hour sessions of speech related services. (Exbs. 38, 39 & 40).
- M. Parents requested ; to perform additional testing to give / the proper label of Autism. (Exb. 41).
- N. At 40 months changed label to Autism. (Exb. 50, 51 & 52).

O. A second service plan was developed by _____ consisting of 30 OT sessions of 30 minutes and 10 speech language therapy sessions over a twelve month period beginning _____ and ending _____ (Exb. 54)

P. At 45 months (_____) had _____ re-evaluated. (Exb. 65).

V. ISSUES - The primary issue in this case is whether _____ Schools has with the IEP dated _____; offered _____ a free and appropriate public education (FAPE) as required by the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. §1412 (1); 34 C.F.R. § 300.26(b)(3). If the finding is that it did not then the secondary issue is whether the placement of the child by the parents at the _____ was appropriate. The final issue is whether _____ has violated the §504 rights of _____.

VI. RULING OF HEARING OFFICER. I find that the IEP dated _____ did not afford _____ a free and appropriate public education. I further find that the placement of _____ at the _____ by the parents was appropriate. Accordingly, the parents are entitled to reimbursement from _____ for educational expenses incurred by them at the _____ for the school year commencing _____ through _____. There is no merit to the §504 claim and it is dismissed.

VII. RATIONALE FOR HEARING OFFICER'S RULING.

A. NATURE OF _____'S DISABILITY - The first step in determining if an IEP offers FAPE is to identify the disability of the child. In this way it is possible to form some reasonable opinion from the evidence as to whether a proposed IEP will afford educational benefit. The record in this case is clear. _____ suffers from severe autism. On the Childhood Autism Rating Scale (CARS) _____ has a score of 46 (Exb. 45) which is severe. With the intense intervention afforded by the _____ has at 46 months of age improved _____ CARS score to 41.5 (Exb. 66).

Normal children learn at an accelerated rate by observing people or things in their environment and imitating what they see or hear. So if one child sees another child throw a ball he or she would want to imitate that activity and would likewise throw the ball. _____ was totally lacking in this ability. (Exbs. 3, 5, 11, 27, 29 p2, 30, 47, testimony T411, 17-25). _____ came to the _____ with no imitation skills, for example _____ could not imitate clapping hands or standing up. (_____ testimony T-696, 25 through T-697, 2) At 46 months age _____ ability had reached that of an 18 to 24 month old. (Exb. 67, _____ testimony T-412, 11-24).

also suffers from the inability to engage in joint attention. testimony T-423, 18-24; testimony T-686, 20; T-701, 9; T-728, 14; T-867, 7; testimony T-919, 19; T-919, 24) A normal child will see things and point them out, thereby focusing on an object or activity jointly with another person. For example a child might see a fire truck and point it out to his father. The father would then say "fire truck" and the child would thereby learn the label for that object. Young children repeat this activity to the point of exhausting their adult companions. (testimony T-343, 5 to T-344, 3) Their minds are like sponges absorbing everything. ability in this area is very limited.

Many autistic children become almost entranced in repeating over and over again a certain activity or verbalizing a certain sound. This activity is called "self stimulating" and when a child is engaged in the activity it is said that he is "stimming". There are degrees of self stimulation and is severe. likes any long narrow object (pencil, ruler, toothbrush, paint brush, spoon, etc.) which will hold between thumb and fingers and flop up and down. It seems will not voluntarily ever tire of this activity. (testimony T-707, 7; T-705, 21) Some autistic students who have a mild stimming problem, like tapping a toe, can still learn while stimming but students with severe self stimulation must be stopped before learning can proceed. testimony T-245, 8-23) When so engaged and focused is unable to learn testimony T-348, 3-8). If an object is taken from will then attempt to locate the object that was taken (testimony T-573, 18-23). At times it is difficult to redirect or stop T-627, 16-22) --- also likes to constantly make a sound that sounds like "Eeeee".(testimony T-602, 24; testimony T-686, 20) This is another form of self stimulation. will also revert to stemming if left alone. (Exbs 30, 45, 47, 50 psychological report 51 3C, 56 last page & 65; testimony of T-176, 15-22; testimony T-780, 16-20). Accordingly, the stimming must be stopped before learning can commence. Once the stimming is stopped then one can attempt to have focus on a learning activity.

This brings us to another of problems. has extremely inappropriate social behavior. frequently cries, throws temper tantrums, bites, kicks, does table sweeps (sweeps everything off the table); (testimony T-603, 23-25) and throws objects. (Exbs. 17 p2, 17 p3, 36, 44, 50 page 2, 56, 57, 59, 66 page 3, & 75; testimony T-732, 9). does this to such an extent that the routinely graphs the incidents. (Exb. 36) Much of this is brought about due to low frustration level (Exbs. 17 p2, 17 p3, 36, 44, 50 page 2, 56, 57, 59, 66 page 3, & 75). and

inability to communicate. (Exbs. 5, 17, 30, 32, 45, 45, 46, 47, 56, 64 & 67) For the first 12 months of life would only recognize mother and did not recognize father or sister. (testimony T-707, 17-24) had no vocabulary at all until 24 months of age (Exb. 5, paragraph 2) nor could follow verbal commands at 31 months of age. (Exb. 17, page 2 #2; testimony T177, 12-16). will now accept the presence of some adults but is fearful of other children because their actions are unpredictable. (testimony T-707, 17-24). sister has been given instruction at the and now is accepted by / T-754, 23-24)

B. THE PROGRAM AT Y DOESN'T OFFER FAPE. Counsel for summed it up best in a question posed to asked "Would you agree that the efficacy of any educational program for preschool autistic students is related to a number of factors such as the age of the child and the severity of the child's autism?" (testimony T-456, 14-17) indicated that age is not a factor, that in fact the younger an autistic child enters an intense program the better. (testimony T-456-21 through T-457, 3) However, did agree that the more severe the autism the more intense the service had to be. testimony T-457, 12-14) Counsel also asked if the number of students being taught at the same time, the teachers and their competence would be factors in determining the efficacy of any educational program and agreed. testimony T-457, 9-25). The program at normally involves two sessions, one in the morning to one group and one in the afternoon to a second group. It has one teacher and either one or two assistants. Children are given some direct instruction (one on one). They are directed to do an activity by themselves, such as putting a puzzle together. Approximately every 15 to 30 minutes they are rotated to new activities. At times they will have a group activity.

suffers from severe autism and recognized this as they singled out to be the only student in their preschool autistic program to attend both morning and afternoon sessions. (See Exb. 76). told when visited her class that personally spends about 15 minutes per child testimony T-727, 5-9). So based on that, could expect to spend about 30 minutes per day directly with . Given the number of other children, the requirement to work independently, the natural distractions at and lack of communication skills, social behavior, inability to stay on task for more than a few minutes, fear of other children and severe propensity to self stimulate and inability to learn when self stimulating, ability to access the curriculum offered at

would be so impaired as to deny educational benefit.

claims that this is a dispute over methodology but I am not convinced that that is the issue. The primary mode of instruction at is the TEACCH method which involves a lot of visual stimulation and considerable independent work on individual skills and may be useful to some autistic children. also uses the ABA method of instruction (: Testimony T-94, 20-25; testimony T-282, 7-20). If, however, due to the severe nature of a child's disability (severe self stimulation, lack of imitation, joint attention and communication skills, inability to stay on task, hyperactivity, social behavioral problems, etc., etc.) : cannot access the curriculum being taught using that methodology without the intervention of more intense supervision and personal instruction, then is being denied FAPE. If had only one autistic child to teach she may choose to employ either the TEACCH or the ABA methodology depending on that child's needs. The child given that level of intense personal instruction may very well respond to either method. The IEP did not indicate that was going to get this type of intense personal supervision and accordingly, given many problems and defects would not be able to benefit from the program at

I had the personal opportunity to observe both schools and am convinced that had many more distractions and noises. There were more children than teachers and assistants. There is also evidence that some of the applications of the TEACCH methodology were not being properly followed. Dr. visited on four occasions (testimony T-380, 12-13). observed what believed to be the inappropriate application of the picture exchange (a procedure where a child gives a picture to a communication partner representing something he or she wants.) : noted that the purpose of a picture exchange was eventually to have the child move from using the picture to verbalizing what they want and when verbalization occurs it should be reinforced rather than continuing to insist on the production of the picture. : noted that a verbalizing child was still being requested to present pictures which only teaches that in that environment verbal communication serves no purpose. (testimony T-385 through T-386, 12; also T-389, 1-8) : also observed children engaged in self-stimulatory activities that were not interdicted. testimony T-386, 20 through T-387387, 15) who also visited two occasions observed similar self stimulatory activities in the classroom which were not interdicted. testimony T-725, 13 through 726, 2). While it is possible that these types of activities were rare occurrences that just happened to occur when these visitors appeared, it is more probable that children who have

these propensities will engage in these activities on a more frequent basis when a teacher is required to divide her attention among several students. Given deficits in so many areas it is difficult to envision receiving much education benefit in this environment.

The record clearly indicates that autistic children need early intense intervention testimony T-679, 19-20) and it would logically follow that a child with multiple problems and a level of autism similar to would need even more intense intervention. in its "Proposed Findings of Fact and Conclusions of Law" argues that despite the intense program at the progress in social pragmatics was not significant. It is difficult for this Hearing Officer to understand how the less intense program used at would result in more progress.

It appears to this Hearing Officer from the evidence that prefers to place autistic students in its preschool autistic program and then modify the program as the need arises. For example it is noted that does not offer an extended school year initially to anyone, choosing instead to defer that decision until later. testimony T-57, 8-11; testimony T-276, 25 through T-277, 1-21) Likewise a behavioral plan is not initially done. testimony 251, 16-18) These items appear to be done on a "wait and see" basis. The evidence reveals that offers either the preschool autistic classroom or home based ABA instruction. testimony T-94, 20 through T-95, 1; testimony T-282 through T-284). It appears from Exb. 71 that initially offered the home bound ABA instruction. However, was later informed by that this letter was generated only to inform the transportation people not to send a bus to pick up. testimony T-611, 4-21) The Hearing Officer has trouble understanding why could not send a letter to their transportation people that just says " is in private placement so you don't need to pick up." I also note from the exhibit that the letter was addressed to Mr. and Mrs. and copied to the Principal, the student file, the educational specialist and the preschool chair, but not to anyone in transportation. Judging from Dr. demeanor and professionalism I am of the opinion that at the time signed her name to that letter meant what said. had made a decision to offer ABA homebound instruction and shortly thereafter that decision was rescinded in favor of seeing how would do at. Based on how ESY and behavioral decisions are made and the explanation given for Exb. 71 and exhibits 76-A, 76-B and 76 it is apparent truly wanted to trial test at its preschool autistic program prior to developing an individualized educational plan actually suited to meet unique needs. This process violates the spirit of IDEA. See *Spielberg v.*

- C. FAILURE TO INCLUDE EXTENDED YEAR SERVICES IS A DENIAL OF FAPE. In order to prevent significant regression [redacted] needs an extended school year. [redacted] testimony T-276 5-7; [redacted] testimony T-439, 16; T-438, 19 and T-436, 8; [redacted] testimony T-814, 21 through T-815, 5; Mrs. [redacted] testimony gives specific samples of regression for even short periods of time T-539, 18; T-622, 14; T-646, 20). This was not included in [redacted] IEP. [redacted] insinuates that it would likely have offered this to [redacted] later in the school year ([redacted] testimony T-276, 25 through T-277, 1-21) and given the fact that all but one autistic child at [redacted] have been offered ESY ([redacted] r testimony T-277, 3-15) it is likely, given the severity of autism, that this service may very well been offered at a later date. However, the IEP which had an ending date of [redacted] did not offer ESY, and absent its inclusion, a parent who signed off on that would be at a loss if summer arrived and ESY was not offered to [redacted] at that time. However, if it is not in the IEP then it is not an included service. At the very least the IEP should have contained language to the effect that [redacted] would be re-evaluated and seriously considered for ESY in the early spring allowing enough time for due process if it is not offered. Absent any promise and the short window of opportunity autistic children have to learn critical skills the parents could not risk the regression that would occur over the summer. The evidence shows that [redacted] regresses when [redacted] is out of school for one week. [redacted] testimony T-539, 18; T-622, 14; T-646, 20) [redacted] who has hands on experience with [redacted] noted that in [redacted] experience with autistic children as severe as [redacted] a summer off would result in basically having to start over. ([redacted] testimony T-788, 12 through T-789, 1) [redacted] must believe that autistic children regress because they routinely offer ESY to all autistic children ([redacted] testimony T-277, 3-15) . It should not be necessary for a child to sit out a summer to see if he actually regresses. Dr. [redacted] and [redacted] in their professional opinions stated that [redacted] definitely needed ESY ([redacted] testimony T-439, 16; T-438, 19 and T-436, 8; [redacted] ; testimony T-814, 21 through T-815, 5) and [redacted] r agreed that autistic children in general need ESY. ([redacted] testimony T-276 5-7) Virginia Administrative Code, 8 VAC 20-80-62, clearly states that at the beginning of each school year, the local educational authority should have an IEP in effect for each child with a disability. I do not take that to mean that the IEP should be partially in effect or almost in effect. The IEP when drafted on [redacted] for the school year ending on [redacted] did not incorporate any provision for ESY except for a notation of the mother's desire for the service and therefore it was not included. In *M. M. V. School District of Greenville County*, 37 IDELR 183 (U.S. Court of Appeals, 4th Circuit 2002) the Court held that ESY services are only necessary to a FAPE

when the benefits a disabled child gains during the regular school year will be significantly jeopardized if he/she is not provided with an educational program during the summer. A showing of actual regression is not required as this can be established by expert testimony. In this case there were no witnesses who said [redacted] did not need the extended school year and several expert witnesses who said [redacted] did. Regression occurred when [redacted] was off for even one week. (Mrs. [redacted] testimony gives specific samples of regression for even short periods of time T-539, 18; T-622, 14; T-646, 20). After describing how difficult the regression was for [redacted] when out of school for a week the Hearing Officer asked Mrs. [redacted] what it would be like if [redacted] was out for a couple of months and her response with inflection was "No. I can't even imagine." (Mrs. [redacted] -646, 10)

- D. VIOLATION OF THE PROCEDURAL REQUIREMENTS CONSTITUTE A DENIAL OF FAPE. The IEP failed to provide any criteria to measure progress toward the Fine Motor Annual Goal (Exb. 76, p5); the Self Help Annual Goal (Exb. 76, p8); the Social Communications Annual Goal (Exb. 76, p11); or the Cognitive/Language Annual Goal (Exb. 76, p18). One of the procedural requirements outlined in IDEA is the mandatory inclusion of objective criteria and evaluation procedures. 20 U.S.C. 1414 (d)(1)(A). 34 CFR 300.347 (a) (7) requires the inclusion in an IEP of information as to how the annual goals will be measured.

PS argues that this is a procedural oversight and not fatal. In *Board of Education of the Hendrick Hudson Central School District, et al. V. Rowley, et al* (102 S. Ct. 3034 (1982) the court held that an inquiry in determining whether a FAPE is provided is twofold: 1.) Have the procedures set forth in the IDEA been adequately complied with? And 2.) Is the IEP reasonably calculated to enable the child to receive educational benefits? While mere technical procedural violation is not fatal I am of the opinion that failure to include how one is going to measure achievement of the goals set out in an IEP to be substantial and fatal to the school's case. See *Amnda J. V. Clark County School District*, 35 IDELR 65 (U.S. Court of Appeals, 9th Circuit (2001); see also *Cleveland Heights-University Heights City Sch. Dist. V. Boss by & Through Boss*, 144 F. 3d 391, 398 (6th Cir. 1998; see also *Jaynes v. Newport News School Board*, 35 IDELR 1 (U.S. Court of Appeals, 4th Circuit (2001 unpublished).

The IEP also failed to include a Behavioral Intervention Plan despite the fact that there was ample evidence that [redacted] frequently engaged in temper tantrums, biting, table sweeps, crying, throwing objects and kicking. (Exbs. 17 p2, 17 p3, 36, 44, 50 page 2, 56, 57, 59, 66 page 3, & 75; [redacted] testimony T-732, 1-12). Indeed the [redacted] had charted those activities. (Exb 36). 20 U.S.C. §1414 (d)(3)(B)(I) provides that an IEP team must consider strategies for dealing with

children who exhibit behavior that impedes his learning or that of others. Dr. [redacted] when asked if [redacted] / would interfere with other students stated "If [redacted] didn't have a lot of direct guidance, it is possible because when [redacted] engaging in self-stimulatory behavior, [redacted] can get pretty loud and that could interfere with what other kids are doing on an ongoing basis. Also... for example, if kids were painting and were sort of seeking out a long instrument in the environment to stim on, [redacted] could take another child's educational materials..." (Testimony T-514, 15 through T-515-4). A reasonable parent with a child who frequently exhibited the propensities of [redacted] would naturally be fearful of placing a child in a setting where there is no plan in place for dealing with such exhibits. Given the need to address [redacted] behavior in order for [redacted] to learn, the absence of any behavioral intervention plan is more than mere technical procedural violation.

E. [redacted] SCHOOL IS AN APPROPRIATE PLACEMENT FOR [redacted]. While at the [redacted] School, [redacted] has made progress. (Exbs. 11, 27, 45, 46, 47, 50 page 2, 56, 59 & 64.) Initially [redacted] had no imitation skills, spoke no words, did not recognize [redacted] father or sister, [redacted] testimony T-696, 11-13) constantly engaged in self stimulating activities and had no receptive communicative skills. Through intense one on one ABA instruction afforded to [redacted] at the [redacted] School [redacted] has developed a relationship with [redacted] father and sister, ([redacted] testimony T-754, 15) has learned to imitate some activities and generalize some of those activities. [redacted] CARS rating has gone from a 46 to a 41.5 and has developed [redacted] communication skills including the use of a small vocabulary. [redacted] behavior has improved except during prolonged absences from the school routine. It is noted that [redacted] has stated " [redacted] appears to be receiving maximum benefit from the structure at [redacted] School for educational purposes " ([redacted] testimony T-35, 17-25).

[redacted] has argued that the [redacted] School is not appropriate because it is not the least restrictive environment as mandated by 20 U.S.C. §1412(a)(5)(A). The truth is that both [redacted] / and the [redacted] School are restrictive environments. In both environments [redacted] will spend [redacted] day with autistic preschool children in self contained classrooms. It is true that [redacted] might see non-disabled children at [redacted] but [redacted] won't matriculate with any of them because of [redacted] age ([redacted] is preschool) and [redacted] disability. [redacted] lacks the skills necessary to benefit from any such association. ([redacted] testimony T-728, 5-21) [redacted] inability to imitate, limited ability to engage in any joint focusing and lack of communication skills would render the limited passing association with non-disabled students meaningless to [redacted] 1. There is evidence that in order for [redacted] to receive benefit from others they must first be taught how to relate to [redacted] 1. There is no

evidence that the other non-disabled students at _____ receive such training. The least restrictive environment must still be an environment where _____ can receive educational benefit.

_____ also argues that the _____ School does not have a certified Occupational Therapist or Speech Pathologist. The record indicates that the staff at the _____ School have been instructed to include techniques in the daily curriculum to address these areas. The record also indicates that _____ is obligated, has in the past and is willing in the future, if requested, to provide those services to _____ under a service plan.

F. _____ HAS NOT VIOLATED §504 OF THE REHABILITATION ACT. In order to prevail with this claim the parent would have to show that _____ has been subjected to discrimination or excluded from a program or denied benefits based solely on _____ disability. See *Doe v. Arlington School Board*, 41 F. Supp. 2d 599, 608 (E.D. Va. 1999). It is very difficult for a school system to discriminate against a student who has been unilaterally placed elsewhere and never attended the public school. Certainly, _____ has spent extensive time in testing and considering _____ for services. The school system has afforded _____ an OT and speech therapy service contracts and considered _____ for its preschool autistic program at _____. A denial of FAPE is not ipso facto a §504 violation.

VIII NOTICE OF APPEAL RIGHTS - This ruling shall be final and binding upon the parties unless the decision is appealed by either party to a state circuit court or a United States District Court within one year of the date of this ruling. See §22.1-214; 34 CFR §§300.510, 300.512; 300.514

Hearing Officer

Date

VIV CERTIFICATIONS

I certify that I have on this _____ I mailed the Original record and all exhibits to Dr. _____ of the _____ School system and copies of the opinion to Mr. _____ Esquire, counsel for _____, Dr. _____, Mr. & Mrs. _____, Esquire, counsel for the parents, Dr. Judith A. Douglas and Director of the Office of Due Process and Complaints for VDOE, at their respective addresses..

Hearing Officer